



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
HERITAGE CHRISTIAN SCHOOL**



OTIS FRESHWATER v. STATE OF INDIANA

Appeal from:
Grant Superior Court
The Honorable Jeffrey D.
Todd, Judge

Oral Argument:
Tuesday, April 15, 2008
1:30—2:10 p.m.
20 minutes each side

CRIMINAL LAW

Did the trial court err by admitting hearsay statements from a police officer over Mr. Freshwater's objection?

Did the State fail to meet their burden of proof on the count of residential entry, and if so, did the trial court err by failing to rule in Mr. Freshwater's favor on that count?

Facts and Procedural History

In January of 2007, Oradee "Bay" McCray lived in the downstairs apartment in a duplex located on South Boots Street in Marion with her adult son, Anderson. Another of McCray's adult sons, Otis Freshwater, lived in the upstairs apartment.

At approximately 1:00 a.m. on January 9, 2007, Freshwater pushed open the door and entered McCray's home. Freshwater demanded that McCray give him money. When McCray refused, Freshwater held up a butcher knife, pointed it toward McCray, repeated his demand for money, and told McCray that if she did not give him her money, he would kill her. McCray gave Freshwater \$107.00. After taking the money, Freshwater left McCray's home.

McCray ran to a neighbor's home. The neighbor called 911 and reported the robbery to the police. McCray returned home once she was convinced the police were on their way. When the police arrived, McCray seemed nervous, pacing from side to side, repeatedly mumbling "he robbed me, he took a hundred an' seven dollars (\$107.00), ... he robbed me." McCray unequivocally identified Freshwater as the perpetrator.

On January 18, 2007, Freshwater was charged with one count of armed robbery as a Class B felony and one count of residential entry as a Class D felony. A jury trial commenced on May 21, 2007. At the conclusion of the State's case-in-chief, Freshwater moved for a directed verdict on the residential entry charge. The trial court denied Freshwater's motion, finding

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CASE SYNOPSIS

that because there was contradictory evidence, the issue should be left to the jury to decide. Freshwater rested without presenting any evidence, and the case was submitted to the jury. On May 22, 2007, the jury found Freshwater guilty as charged.

Parties' Arguments

Inadmissible Hearsay

Freshwater contends that the trial court abused its discretion by admitting McCray's oral statements implicating him in the armed robbery through the testimony of Officer Leland Smith at trial. Freshwater argues that the statements were inadmissible hearsay. The State contends that McCray's oral statements implicating Freshwater were properly admitted because the statements were admissible under the excited utterance exception to the hearsay rule. The State further contends that even if McCray's statements did not fall under the excited utterance rule, the statements were merely cumulative of other evidence admitted at trial and any error was harmless because the "improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Mathis v. State*, 859 N.E.2d 1275, 1280 (Ind. Ct. App. 2007).

Directed Verdict

Freshwater next contends that the trial court erred by denying his motion for a directed verdict with respect to the residential entry charge at the close of the State's case-in-chief because the State failed to disprove beyond a reasonable doubt his defense that McCray had consented to his entering her apartment. The State counters by arguing that the evidence was sufficient to support Freshwater's conviction for residential entry.



GLOSSARY OF TERMS

Directed Verdict – A verdict entered in a jury trial by the court, without consideration by the jury, because the facts elicited during the trial, together with the applicable law, made it clear that the directed verdict was the only outcome that could have been reasonably returned. *Barron's Law Dictionary* 147 (5th ed. 2003).

Excited Utterance - A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. *Montgomery v. State*, 694 N.E.2d 1137, 1140 (Ind. 1998); Ind. Evidence Rule 803(2).

Residential Entry – The knowing or intentional breaking and entering by one into the dwelling of another. *McKinney v. State*, 653 N.E.2d 115, 117 (Ind. Ct. App. 1995); Ind. Code § 35-43-2-1.5 (2006).

TODAY'S PANEL OF JUDGES

Hon. Melissa S. May (Vanderburgh County), Presiding

- Judge of the Court of Appeals since April 1998

Melissa S. May was appointed to the Court of Appeals in April of 1998 by Governor Frank O'Bannon and was retained on the Court by election in 2000. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on its Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994 to 1999 and has been the

co-chair of ICLEF's Indiana Trial Advocacy College from 2001-2005. She is a fellow of the Indiana Bar Foundation, as well as of the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an advisory panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

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TODAY'S PANEL OF JUDGES

Hon. Michael P. Barnes (St. Joseph County)

- Judge of the Court of Appeals since May 2000

Michael P. Barnes was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon on May 22, 2000. He received his B.A. from St. Ambrose College in Davenport, Iowa in 1970 and his J. D. from the University of Notre Dame Law School in 1973.

Judge Barnes was a Deputy Prosecuting Attorney and privately practiced law in South Bend from 1973 to 1978. In 1978 he was elected the St. Joseph County Prosecuting Attorney, a position he held for 20 years. During that tenure, Judge Barnes was elected President of the National District Attorneys Association (1995-1996), Chairman of the Board, Indiana Prosecuting Attorneys Council (1982-1983, 1992-1993), President of the St. Joseph County Bar Association (1992-

1993), National Board of Trial Advocacy (1995-1996), National Advisory Council on Violence Against Women (1997), Chairman of the Board of Regents, National College of District Attorneys (1997-1998), American Prosecutor's Research Institute (1997-1998), and various other professional and civic organizations.

Judge Barnes is a member of the Indiana Bar Foundation, the St. Joseph County Bar Association, and serves on the Board of Directors of the Friends of the St. Joseph County Juvenile Justice Center and the Indiana Judges Association.

Judge Barnes, who was retained on the Court of Appeals by election in 2002, is married and has two sons.

The 15 judges of the Indiana Court of Appeals issue more than 2,800 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Cale J. Bradford (Marion County)

- Judge of the Court of Appeals since August 2007



Cale J. Bradford was appointed to the Court of Appeals by Governor Mitch Daniels and took his seat on August 1, 2007.

Prior to his elevation to the Court of Appeals, Judge Bradford served for more than 10 years as Judge of the Marion Superior Court, seven years in the criminal division and three in the civil division. He was twice elected presiding judge by his colleagues.

During this tenure, Judge Bradford chaired the Marion County Criminal Justice Planning Council, a group of local elected and appointed officials who recommended ways to improve the county's response to criminal justice problems, including jail overcrowding, staffing, and budget issues. His efforts led to the end of 30 years of federal oversight of the Marion County Jail and to security improvements at the county's Juvenile Detention Center.

Before joining the bench, Judge Bradford served in the Marion County Prosecutor's Office for two years, overseeing a staff of more than 100 attorneys. For five years, he was an Assistant United States Attorney for the Southern District of Indiana, prosecuting major felony drug trafficking cases. He engaged in the private practice of law from 1986 to 1991, and served as both a deputy prosecutor and public defender during his career.

A native of Indianapolis, Judge Bradford received a B.A. in labor relations and personnel management from Indiana University-Bloomington in 1982 and his J.D. from Indiana University-Indianapolis in 1986. He is the Court of Appeals' liaison to the Indiana Judges Criminal Instructions Committee, which provides guidance to judges on jury instructions in criminal cases, and a former member of both the Indiana Judges Criminal Policy Committee and the Board of Directors of the Indiana State Judicial Conference. He is a Distinguished Fellow of the Indianapolis Bar Association and has taught ICLEF seminars on trial practice for more than 10 years. From 2005 to 2007, Judge Bradford hosted "Off the Bench with Judge Cale Bradford," a legal commentary program on Marion County's government access network. He also served on the Judicial Technology and Automation Committee (JTAC), helping to draft the state judiciary's policies on technology and electronic case management.

Judge Bradford is a former director of Indianapolis's John P. Craine House, a residential alternative to incarceration for women offenders with pre-school-aged children. He is a member of the Lawrence Youth Football League Advisory Board of Directors and the Lawrence Men's Soccer Booster Club. He and his wife, a full-day kindergarten teacher, have five children.

ATTORNEYS FOR THE PARTIES

For Appellant, Otis Freshwater:
C. Robert Rittman
Grant County Public Defender
Marion

C. Robert Rittman has lived in Marion for the past 30 years. He received his bachelors degree from Indiana University in Bloomington, majoring in political science and history, and earned his J.D., also from IU-Bloomington.

Mr. Rittman served in the United States Army from 1969 to 1973. He served in Vietnam where he attained the rank of captain and was awarded the Bronze Star.

For eight years, Mr. Rittman was the chief deputy prosecutor in Grant County. He has also served as

a public defender, and is currently Grant County's Managing Public Defender, coordinating a group of 12 part-time attorneys.

Mr. Rittman maintains a full-time solo private general practice as well, specializing in both criminal and civil law.

Mr. Rittman and his wife have an adult daughter who works for the Town of Fishers, and a son who is a freshman at Marion High School.

For Appellee, State of Indiana:
Joseph Delamater
Deputy Attorney General
Indianapolis

Joseph Delamater grew up in Putnam Valley, NY and received a B.A. in Political Science from Manhattanville College in 2004, with distinction, writing a thesis on the affect of the internet on the 1st and 4th Amendments to the U.S. Constitution. During college he interned with the New York State Attorney General in Consumer Frauds and Protection.

Originally wanting to be a social studies teacher, he realized during college he was better suited for the law. He received his J.D. from IU School of Law – Indianapolis in 2007. During law school, Mr. Delamater worked as a research assistant to Professor Robert Lancaster and was hired by the Indiana Office of Attorney General to work in its

professional licensing section. After one year, he transferred to the appeals sections and has been there ever since. During law school he participated in the pro bono program, and was recognized for volunteering close to 200 hours of time.

Mr. Delamater is a member of the American and Indianapolis bar associations. He enjoys singing, playing guitar, off-roading, fixing cars, and dabbling in carpentry. He has two large dogs, a Dalmatian and a Boxer. Mr. Delamater and his wife came to Indiana "because of the people, the cost of living, and the city of Indianapolis. It's large enough to have plenty to do, but small enough that you can easily escape," he says.

